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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 166

PENNSYLVANIA LABOR RELATIONS BOARD,
Petitioner,

v.

AUGUST A. NAPOLI, Trading and Doing Business as Seven-Up Bottling Company, Respondent.

BRIEF IN OPPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

JACK J. ROSENBERG,
808 Law & Finance Bldg.,
Pittsburgh 19, Pennsylvania
DAVID E. FELLER,
1001 Connecticut Ave., N. W.
Washington 6, D. C.
S. HAROLD GROSSMAN,
210 Berger Bldg.,
Pittsburgh 19, Pennsylvania
Attorneys for Respondent

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The Respondent respectfully prays that your Honorable Court refuse to issue a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on April 20, 1959.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does the Pennsylvania Labor Relations Board have jurisdiction over a Pennsylvania soft drink bottler and distributor, who operates under a franchise agreement which is part of a national franchise distribution system and who has ten (10) employees, where all sales are made inside Pennsylvania, and purchases of supplies for the relevant annual period from outside Pennsylvania, both direct and indirect amount to $43,879.59?

(a) Does the maxim, *de minimis non curat lex,* apply to oust the exclusive jurisdiction of the National Labor Relations Board over such an employer?

ADDITIONAL PROVISION OF THE STATUTE INVOLVED

In addition to the constitutional provision and pertinent provisions of the Labor-Management Relations Act, 1947, cited in the petition for writ of certiorari, the proviso to Section 10 (a), of the Act, 61 Stat. 146, 29 U.S.C. Section 160 (a), the introductory portion of which is quoted in the petition, is also pertinent to this case. This proviso is:

> ". . . Provided, that the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation, except where predominantly local in character) even though such cases may involve labor disputes affecting commerce . . ."

ADDITIONAL STATEMENT OF THE CASE

In addition to the statement of the case contained in the Petition, the following facts are relevant:

The Respondent is a manufacturer, bottler and distributor of a nationally advertised soft drink called Seven-Up under a franchise agreement from the parent Seven-Up Company of St. Louis, Missouri, which has similar franchise agreements with manufacturers, bottlers and distributors throughout the United States. It is conceded that the action of Respondent, which was found to be an unfair labor practice under the Pennsylvania Labor Relations Act would also have been an unfair labor practice under the provisions of Section 8 (a) of the Labor-Management Relations Act, 1947.

There has been no agreement between the National Labor Relations Board and the Petitioner ceding to the Pennsylvania Labor Relations Board any jurisdiction whatsoever under the provisions of Section 10 (a) of the Labor Management Relations Act, 1947.

ARGUMENT

The affect on commerce is not *de minimis*.

Petitioner herein is contending that annual out-of-state inflow of $43,879.59, which amount represents approximately eighty-five (85%) percent of the total purchases of the Respondent, a Pennsylvania soft drink manufacturer, bottler, and distributor, who operates under a franchise agreement which is part of a national franchise distribution system, does not "affect commerce" within the meaning of Section 2 (7) of the Labor-Management Relations Act, 1947, in that the same is *de minimis*.

The sole basis upon which Petitioner contends the writ should be granted in this case is the dictum contained in *National Labor Relations Board v. Fainblatt*, 306 U.S. 601 (1939) wherein Justice (later Chief Justice) Stone stated:

> ". . . Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected *more than that to which courts would apply the maxim ae minimis.*" (Emphasis supplied.)

Respondents contends that the writ of certiorari should not be granted even if it were desirable to establish limits for the application of the *de minimis* doctrine, because this is not an appropriate case for establishing such limits, since that doctrine has no application to this case. There is no question that your Honorable Court has repeatedly determined that an inflow of purchases from out-of-state suppliers of approxi-

mately $44,000 is substantial. Petitioner does not contend that there is no affect on commerce in this case; its only contention is that the effect is not substantial, but *de minimis*. It is admitted that the act charged to Respondent constituted an unfair labor practice under Section 8 (a) of the National Labor Relations Act.

In every instance in which your Honorable Court has been called upon to pass the application of the *de minimis* theory in relation to Section 2 (7) of the National Labor Relations Act, the Court has refused to find the doctrine applicable. See *Guss v Utah Labor Relations Board*, 353 U.S. 1 (1957), wherein your Honorable Court determined that less than $50,000.00 out-of-state inflow was not *de minimis* and *Amalgamated Meat Cutters et al. v. Fairlawn*, 353 U.S. 20 (1957), wherein your Honorable Court determined that $100,000.00 out-of-state inflow was not *de minimis*.

In addition, your Honorable Court at 347 U.S. 919 refused certiorari in *National Labor Relations Board v. Stoller*, 207 Federal 2d. 305 (1953, 9th Circuit), wherein the Circuit Court of Appeals held that $12,000.00 out-of-state inflow was not *de minimis*. At 348 U.S. 971, your Honorable Court refused certiorari in the case of *National Labor Relations Board v. Daboll*, 216 Federal 2d 143, (1954, 9th Circuit), wherein the Circuit Court of Appeals held that $77,000.00 out-of-state inflow was not *de minimis*. See also *National Labor Relations Board v. Denver Building and Construction Trades Council*, 341 U. S. 675 (1951).

The Respondent's out-of-state purchases were not so negligible as to remove the business beyond the area of affecting interstate commerce within the meaning of

Section 2 (7) of the National Labor Relations Act. This is particularly true in relating the Respondent's out-of-state inflow of $44,000.00 to the current jurisdictional standards of the National Labor Relations Board as the same applies to non-retail establishments. The National Board will now assume jurisdiction of such establishments, if there is either $50,000.00 inflow or outflow. The relationship of $44,000.00 to $50.000.00 (88%) is substantial rather than *de minimis*. There can be no question but that if Respondent's purchases from out of the state were $7,000.00 more, or if the National Labor Relations Board had lowered its jurisdictional standards, as it has the right to do, by $7,000.00, the Board would have taken jurisdiction in this case if requested to do so.

The Volume of Interstate Commerce is Immaterial.

Since the Guss case, supra, there is no longer any question that a State Board does not have jurisdiction in a case such as this. As Chief Justice Warren stated in that case:

> "We hold that the proviso to Section 10 (a) is the exclusive means whereby States may be enabled to act concerning the matters which Congress has entrusted to the National Labor Relations Board . . ."

and referring to *Amalgated Association of Employees v. Wisconsin Board,* 340 U.S. 383, your Honorable Court further stated:

> "In a footnote to the first sentence quoted above the Court cited Section 10 (a) and described its authorization to cede jurisdiction only where the state law is consistent with the national legislation as

insurance that the national labor policy will not be thwarted *even in the predominantly local enterprises to which the proviso applies*". (Emphasis supplied.)

"And here we find not only a general intent to preempt the field, but also the proviso to Section 10 (a) with the inescapable implication of exclusiveness."

In the *Fainblatt* case itself, supra, upon which Petitioner bases its request for the writ, your Honorable Court established the exclusiveness of the National Labor Relations Board's jurisdiction regardless of the amount of commerce involved. There your Honorable Court stated:

"Nor do we think it important, as respondents seem to argue, that the volume of the commerce here involved, though substantial, was relatively small as compared with that in the cases arising under the National Labor Relations Act which have hitherto engaged our attention. The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small . . .

"The language of the National Labor Relations Act seems to make it plain that Congress has set no restrictions upon the jurisdiction of the Board to be determined or fixed exclusively by reference to the volume of interstate commmerce involved . . .

"The Act on its face thus evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce by the adoption of measures for the prevention or control of certain specified acts—unfair labor practices—which provoke or tend to provoke strikes or labor

disturbances affecting interstate commerce. Given the other needful conditions, commerce may be affected in the same manner and to the same extent in proportion to its volume.

". . . In this, as in every other case, the test of the Board's jurisdiction is not the volume of the interstate commerce which may be affected, but the existence of a relationship of the employer and his employees to the commerce such that, to paraphrase Section 10 (a) in the light of constitutional limitations, unfair labor practices have led or tended to lead 'to a labor dispute burdening or obstructing commerce.'"

The National Labor Relations Board Would Have Taken Jurisdiction in This Case Had it Been Requested to Do So.

Respondent further contends that this is not an appropriate case for delimiting the *de minimis* theory, since Respondent is a manufacturer, bottler and distributor of a nationally advertised product under a franchise from an out-of-state producer of the basic product (syrup) from which respondent manufactures the ultimate product. The St. Louis, Missouri basic producer has granted similar franchises to many other bottlers and distributors throughout the United States. In 7 *Up Bottling Co. of Miami*, 92 N.L.R.B. 1622, affirmed by the Fifth Circuit Court of Appeals, 196 Federal 2d 424, the Board took jurisdiction where the dealer had only $82,000.00 of purchases from out of the State of Florida, at a time when its jurisdiction standards called for $500,000.00 of out of state inflow. The employer there

was a franchise affiliate of the same company as Respondent. The Court there, holding that the employer was an integral part of a multi-state enterprise said:

> "Respondent (7 Up Bottling Co.) is an affiliate of a group of manufacturers of this product (7 Up) in numerous states, operating under a franchise granted by the parent firm in St. Louis, Missouri. The product is marketed under a nationally advertised trade mark."

The National Labor Relations Board has frequently affirmed this principle that a locally franchised bottler and distributor of a nationally advertised and marketed soft drink was an integral part of a multi-state enterprise. See *American Factors Co.*, 98 N.L.R.B. 447; *7 Up Bottling Co. of Miami, supra; Raleigh Coca Cola Bottling Works*, 80 NLRB 768; *Coca Cola Bottling Co. of Tulsa*, 85 NLRB 606; *Orange Crush of Puerto Rica*, 118 NLRB 217; *7 Up Bottling Co. of Detroit*, 120 NLRB No. 141. The Supreme Court of the United States has also affirmed the principle that a franchised dealer of a nationally advertised commodity is an integral part of a multi-state non-retail enterprise. See *Howell Chevrolet v. National Labor Relations Board*, 346 U.S. 482.

In *Polish National Alliance v. N.L.R.B.* 322 U.S. 645, (1944) your Honorable Court, speaking through Mr. Justice Frankfurter said:

> "... in this Act, (the National Labor Relations Act) ... Congress has explicitly regulated not merely transactions of goods in interstate commerce but activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce.

> . . . Whether or not practices may he deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative affect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which, if left unchecked may well become far-reaching in its harm to commerce. *Labor Board v. Fainblatt,* supra at 607-608."

Congress Has Preempted the Field.

Petitioner complains that if the *de minimis* doctrine is not applicable here, there is little place for state boards in the labor relations field. That this may be so, would not be because of a decision in this case, but because the Congress of the United States has preempted the field and because the National Labor Relations Board has not seen fit to cede jurisdiction to the State Board as it is authorized by Congress to do by Section 10 (a) of the Act. The National Board has never entered into an agreement with any state agency pursuant to Section 10 (a) of the Act. Likewise, as Petitioner states in the first paragraph of the portion of the Petition setting forth reasons for granting the writ, approximately three-fourths of the States have not adopted labor legislation modeled on the original "Wagner Act". In all those states, in the states which have State Boards in the area of the "no man's land" established by the Guss Case, and in all other cases, where, as here, Section 10 (a) of the Act might be applicable to permit the State Board to exercise jurisdiction if that section had been used by the National Board, the State Boards do not

have jurisdiction. A refusal of certiorari in this case would not enlarge this area in which the State Boards have no jurisdiction.

Further, the fact that the highest Court of the State of Pennsylvania has found that the effect on commerce was substantial and not *de minimis* should preclude the granting of certiorari here. The Supreme Court of the United States should not be called upon to decide this question on a case by case basis. As stated in the second *San Diego Building Trades Council v. Garmon* case, 359 U.S. 236, handed down by your Honorable Court on April 20, 1959 (the same day the Pennsylvania Supreme Court handed down its decision in this case);

> "In determining the extent to which state regulation must yield to subordinating federal authority, we have been concerned with delimiting areas of potential conflict; potential conflict of rules of law, or remedy, and of administration. The nature of the judicial process precludes an *ad hoc* inquiry into the special problems of labor-management relations involved in a particular set of occurrences in order to ascertain the precise nature and degree of federal-state conflict there involved, and more particularly what exact mischief such a conflict would cause. Nor is it our business to attempt this. Such determinations inevitably depend upon judgments on the impact of these particular conflicts in the entire scheme of federal labor policy and administration. Our task is confined to dealing with classes of situations. To the *National Labor Relations Board and to Congress must be left those precise and closely limited demarcations that can be ade-*

quately fashioned only by legislation and administration. . . ." (Emphasis Supplied)

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Section 7 of the Taft-Hartley Act, or constitute an unfair labor practice under Section 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. (Citations omitted) Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes."

CONCLUSION

Respondent therefore submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JACK J. ROSENBERG
DAVID E. FELLER
S. HAROLD GROSSMAN
Attorneys for Respondent